

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19

FRED MEYER STORES, INC.

Employer

and

Case 19-RC-15057

UNITED FOOD AND COMMERCIAL  
WORKERS, LOCAL 367, affiliated with  
UNITED FOOD AND COMMERCIAL  
WORKERS INTERNATIONAL UNION

Petitioner

**DECISION AND DIRECTION OF ELECTION**

**I. SUMMARY**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended (“the Act”), a hearing was held before a hearing officer of the National Labor Relations Board (“the Board”). Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record<sup>1</sup> in this proceeding, I make the following findings and conclusions.<sup>2</sup>

Petitioner represents certain employees at Fred Meyer Stores, Inc. (“the Employer”) stores in Pierce County, Washington, including a facility in Sumner, Washington (herein “Sumner”). Petitioner in this case seeks a self-determination election for employees working in the nutrition department of the Sumner store (herein “nutrition employees”) to decide whether they wish to be included in the existing multi-facility grocery unit.<sup>3</sup>

The Employer advances two general arguments in opposition to the petition. First, the Employer argues that Petitioner has waived its right to include the petitioned-for nutrition employees in the grocery unit by executing successive multi-facility collective-bargaining agreements covering discrete, well-defined bargaining units. In this regard, the Employer argues further that the parties’ past practice when extending those contracts to subsequent

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<sup>1</sup> The Employer and Petitioner timely submitted briefs, which I have carefully considered.

<sup>2</sup> The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

<sup>3</sup> No other labor organization seeks to represent the employees covered by the instant petition.

groups of employees establishes that the Employer and the Union have historically and intentionally included Pierce County nutrition employees only in the general merchandise unit. Second, the Employer contends that the petitioned-for nutrition employees do not share a sufficient community of interest with grocery unit employees; rather, the Employer claims that the unrepresented Sumner nutrition employees share an overwhelming community of interest with the “residual unit” of all unrepresented general merchandise employees.

Petitioner contends that neither the recognition clauses of the parties’ various collective-bargaining agreements nor the parties’ past practice regarding the Employer’s Pierce County employees establish that Petitioner has waived its right to include the unrepresented nutrition employees in the grocery unit. Petitioner contends further that given the nature of the Employer’s operations, the petitioned-for nutrition employees have come to share a community of interest with grocery unit employees and, but for their unrepresented status, have no community of interest with the Sumner general merchandise employees.

Based on the record as a whole and the parties’ respective briefs, I find that Petitioner has not expressly waived its right to include Sumner nutrition employees in the grocery unit. However, given the parties’ extensive bargaining history and the lack of interchange among the petitioned-for nutrition employees and grocery unit employees, I find contrary to Petitioner, that there is insufficient evidence to establish that Sumner employees share a community of interest with grocery unit employees and, therefore, the petitioned-for self-determination election among those employees would not be appropriate.

At the hearing, the parties agreed that, if I determined that the petitioned-for nutrition employees are appropriately included in the general merchandise bargaining unit—and Petitioner submitted an adequate showing of interest among Sumner general merchandise employees—they would proceed with a self-determination election for Sumner general merchandise employees to decide whether they wish to be included in the existing multi-facility general merchandise unit. Accordingly, given the insufficient community of interest between nutrition employees and grocery unit employees, and the parties’ expressed willingness to proceed to a self-determination election for the unrepresented Sumner general merchandise employees, I will direct an election among those employees.<sup>4</sup>

Below, I have summarized the record evidence detailing the parties’ bargaining history and the Employer’s operations. My analysis of the record evidence, application of Board law, and conclusion follow the summary of evidence. The final section sets forth the direction of election.

## **II. RECORD EVIDENCE**

### **A. Relevant Bargaining History**

The Employer is a State of Delaware corporation that operates 120 “one stop” retail stores in Oregon, Washington, Idaho, and Alaska, as well as eight “marketplace” stores in Shelton (Pierce County) and Vancouver, Washington, and in Portland, Oregon. The Employer’s

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<sup>4</sup> At the hearing the parties stipulated to a number of exclusions, which I have incorporated into my description of the appropriate voting group, below.

“one-stop” stores sell a full line of products, including groceries and general merchandise.<sup>5</sup> The Employer has seven one-stop stores in Pierce County, Washington, including the facility in Sumner.

The parties have long maintained a collective-bargaining relationship regarding Pierce County stores, executing successive collective-bargaining agreements since 1977. Historically, there have been only three types of multi-facility bargaining units covered by those agreements: a grocery unit, a non-food (herein “general merchandise”) unit, and a common check (CCK) unit.<sup>6</sup> The parties’ current collective-bargaining agreement covering Pierce County general merchandise employees is effective by its terms from August 4, 2007 to August 1, 2010. The parties’ current collective-bargaining agreement covering grocery employees is effective by its terms from May 6, 2007 until May 1, 2010.

The recognition clauses of the grocery and general merchandise contracts each contain additional stores clauses. Pursuant to those clauses, the Employer recognizes Petitioner as the exclusive-collective bargaining representative of grocery unit employees at the Employer’s “present and future grocery stores,” and of general merchandise employees at the Employer’s “present and future retail establishments” in Pierce County. Consistent with the parties’ agreements and collective-bargaining history, the parties have added new groups of employees in the existing multi-facility units only after the Union has submitted to the Employer evidence of its majority status among the employees in the respective units.

The parties’ history with regard to the additional stores clauses has been relatively consistent. Contemporaneous with the opening of each new store, Petitioner solicited authorization cards from employees in the various bargaining units it represents. Petitioner also organized employees in new Pierce County stores consistent with the historic units. Once Petitioner collected a sufficient number of cards from unit employees, it submitted that evidence of majority support to the Employer. Thus, in every case where Petitioner had established its majority status among the historical unit of employees, the Employer has agreed to include those employees in the existing multi-facility unit.

More specifically, the parties stipulated that in each of the Employer’s Pierce County one-stop stores where grocery employees have been represented by a union, nutrition employees are not, and have never been, included in the grocery bargaining unit. Rather, at those Pierce County stores where nutrition employees are represented by a union, they are, and have always been, included in the general merchandise unit.

When the Employer opened the Sumner store, Petitioner followed the same process with regard to organizing employees working in that store’s CCK and grocery units. After Petitioner provided the Employer with evidence of its majority status among employees in those two units, the employees were added to the appropriate multi-facility units. At that time, Petitioner did not attempt to organize Sumner nutrition employees as part of the multi-facility grocery unit. Further, Petitioner did not request that the Employer include Sumner nutrition

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<sup>5</sup> The Employer’s eight “marketplace” stores sell primarily grocery items and a significantly more limited line of general merchandise.

<sup>6</sup> A different union represents the Employer’s Pierce County meat/seafood unit employees.

employees within the grocery unit.<sup>7</sup> Petitioner also did not request that the Employer recognize it as the collective-bargaining representative of Sumner general merchandise employees. Thus, the parties have not agreed to include Sumner nutrition employees in the multi-facility general merchandise unit. In sum, the Sumner nutrition employees remain unrepresented.<sup>8</sup>

The parties' bargaining history also reveals that this is not the first time they have disagreed over the status of Pierce County nutrition employees. In Fred Meyer, Inc., Case 19-UC-719, the Employer petitioned the Board to confirm that the grocery contract excluded general merchandise employees, and that the general merchandise contract explicitly covered nutrition employees. There, the Board ordered the Region to hold the petition in abeyance, pending the arbitrator's decision. The arbitrator eventually held that the parties' contract and bargaining history established that nutrition employees were covered by the general merchandise contract rather than the grocery contract, and the Employer's application of the general merchandise contract to nutrition employees was correct. After it won the arbitration, the Employer withdrew its petition.<sup>9</sup>

#### **B. The Employer's Operation at Sumner**

The Sumner store, which is approximately 168,000 square feet, is typical of the Employer's other one-stop shops. The Sumner location is divided into various sections, including Food, Home, and Apparel. Section managers, who report to the store director, respectively run each section. Store directors report to a regional director of stores who is responsible for a geographic area that includes a number of stores.

Within each general section, there are discrete areas or departments for particular products or classes of products. For example, the Food sections are divided into areas for, among other products, produce, frozen foods, and general grocery items; the Home sections include electronics, sporting goods, furniture, and automotive departments; and the Apparel sections are divided into areas for clothing, shoes, luggage, and other so-called "soft goods."<sup>10</sup> Sumner also has loss prevention and operations departments.

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<sup>7</sup> The grocery contract requires that Petitioner provide a separate showing of interest for service deli and bakery employees. Because Petitioner was unable to provide the Employer with evidence of its majority status among the Sumner service deli employees, they were not added to the existing grocery unit and remain unrepresented. Had Petitioner provided the Employer with evidence of majority status among the service deli employees, they would have been added to the multi-facility grocery unit per the parties' collective-bargaining history.

<sup>8</sup> In its brief, the Employer repeatedly asserts that Petitioner failed to obtain majority status among general merchandise employees. The record only reflects that Petitioner did not submit to the Employer proof of its majority status among those employees; no Petitioner representative testified at the hearing. Thus, there is no direct evidence regarding Petitioner's attempt to organize Sumner general merchandise employees.

<sup>9</sup> The status of nutrition employees at the Employer's Lacey and Tumwater, Washington, stores is at issue in Fred Meyer Stores, Inc., Case 19-RC-15036, which is pending before the Board.

<sup>10</sup> This list of subsections is not exhaustive; the record more fully describes the various departments and the products sold within each department.

Section managers are responsible for the departments within their respective sections. For example, the Sumner Food section manager is responsible for the produce, nutrition, meat and seafood, bakery, service deli, health and beauty, and pharmacy departments. Thus, in addition to being responsible for the operation of the Food section, the Sumner Food manager has ultimate control over Food section employees' schedules, is involved in the approval of overtime for Food section employees, and has plenary responsibility for handling problems that arise in any of the various food departments. There is no evidence that section managers' authority extends beyond their discrete section; e.g., there is no evidence that the Sumner Food section manager has any authority over Home section or Apparel section employees.

Given the various collective-bargaining agreements covering the various units at the Employer's Pierce County stores, the Employer goes to great lengths to avoid assigning employees from one unit to work in another. Thus, the Employer's policy in Pierce County is to respond to staffing shortages in a particular department by first attempting to have a department employee assigned to that store come to work. If a store employee is unavailable, the Employer will call in an employee working in the same department but assigned to a different store. Very rarely has the Employer used employees from one bargaining unit to work in another unit.

With the exception of common check employees, employees in virtually every other department at Sumner spend some time during their work day processing freight (also known as "working" or "throwing" freight). "Working freight" involves department employees receiving freight specific to their area and moving it from the stockroom to their department or a designated holding area until employees put it on shelves or racks.<sup>11</sup> Most Sumner employees have a 24-hour window period, beginning from the time employees arrive at work after their department's freight is delivered, to "work" their freight. The only exception appears to be within the grocery department; those employees are required to "work" freight at a rate of 60 cases per employee, per hour. This distinction in moving freight to store shelves appears based in significant part on the larger volume of freight received and sold in the grocery department.

The Employer does not designate specific days or hours for receiving freight at Sumner. Indeed, freight is received at Sumner 7 days a week with trucks from the Employer's warehouses usually arriving from the evening into the morning hours. Vendors (non-Employer suppliers of beer, wine, soft drinks and other products) deliver their products during established delivery times. Freight from the Employer's warehouses is delivered on pallets, secured with plastic wrap. The pallets hold freight for a particular department, which is later broken down by that department's employees.

The frequency and size of freight deliveries vary from department to department. The grocery department usually receives dry grocery shipments in the range of 1,800 pieces to 2,200-2,500 pieces (defined as a full case of product) or 24 – 26 pallets of freight every other day. Perishable grocery items (6 - 12 pallets of meats, cheeses, yogurts, butters) are delivered on alternating days. Milk (approximately 6 – 10 pallets) is delivered on days when perishable items are delivered, but on a separate schedule. General merchandise (Home and Apparel) freight is delivered 3 nights per week, including one load known as a "double truck night." Because the Employer prohibits wooden pallets on the sales floor during shopping hours, the bulk of the freight is processed before the stores open to customers. Throughout the day, however, employees are required to continually restock racks and shelves and engage in other

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<sup>11</sup> Each section has its own area either within a stockroom or nearer to their respective departments to store their freight until it is put on the floor for customers.

“recovery” activities, such as bringing product to the front of each shelf, and generally neatening their departments for the next day.

Employees in every department at Sumner have some interaction with customers. All employees are expected to make eye contact with and smile at customers, and offer assistance when appropriate. The Employer distinguishes the various departments as either selling (general merchandise) or non-selling (grocery), reflecting the Employer’s sales expectations for those departments.

General merchandise employees are required to perform selling functions in their departments, and are required to approach and offer to assist customers who come within seven feet of where employees are working. In this regard, Sumner store director Mike Ayers provided several examples of how general merchandise employees are expected to “sell,” including the following:

- Garden center employees are expected to “sell as many products to each customer as possible” by approaching customers, offering assistance, and suggesting other kinds of products once the customer describes their situation. If, for example, a customer expresses an interest in biodegradable baskets, garden center employees are expected to try to induce the customer to also buy “organic chemicals,” compatible potting soil, or a wheelbarrow; in short, garden center employees must attempt to get customers to “leave with everything.”
- The Employer expects paint department employees not only to sell customers enough paint for their project, but also “the peripherals, paintbrushes, drop cloths, everything that goes with a painting project all the way down to the cleanup, turpentine or . . . other green items that are available.”
- In sporting goods, employees helping customers shopping for a camping trip are expected to try and sell them anything they might need, including tents, sleeping bags, lanterns, heaters, and fuel starters. To that end, sporting goods employees might also coordinate with employees in the Garden Center to sell fire logs.
- In apparel, if a customer comes in looking for a specific blouse, employees are expected to try and sell the customer an entire outfit, as well as any accessories—jewelry, handbags, earrings—that might complement any clothing.<sup>12</sup>

The Employer estimates that employees in the various “selling departments” spend approximately 60 – 70% of their working time assisting and selling to customers. That estimate, however, is based on the store director’s assumptions and not any objective record.<sup>13</sup>

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<sup>12</sup> The Employer provided additional examples for employees working in the furniture department, décor, and electronics.

<sup>13</sup> Ayers described on the record his many administrative responsibilities in addition to walking through the store, speaking with customers, and observing employees. Ayers also allowed that employees may behave differently when he is around, as his “secret shoppers” report that employees spend less time engaging customers than he has been led to believe.

By comparison, grocery employees have less customer interaction and less responsibility for “selling.” Nonetheless, employees in those departments are expected to promote products in their departments when appropriate and thereby encourage customers to buy more products. For example, produce clerks must engage customers and talk about deliveries and new products (e.g., a recent shipment of mangos or pomegranates), and offer product samples to customers as a means of selling. The Employer estimates that produce employees spend 15 – 20% of their time directly selling to customers. In-store bakery employees (employees who bake bread, pies, and other products at the Sumner store) are also expected to sell product by advising customers when fresh bread is or will be available. Like produce employees, bake-off employees spend approximately 15% - 20% of their time selling. Other grocery unit employees’ contact with customers is generally limited to directing customers from one area of the store to another, or helping a customer find a particular product; those employees may spend as little as 5% of their time with customers.

The Employer evaluates all employees (except those primarily assigned to grocery freight) on how well they sell, but evidence regarding the weight accorded to such evaluations is inconclusive. The evaluation form cited by the Employer—which is used for all Sumner employees, including produce, meat and seafood, bakery, and service deli employees—identifies “selling” as the 10<sup>th</sup> of 11 factors. Employees are purportedly graded on a scale of 1 to 5 as to how well they 1) demonstrate product knowledge and selling skills, 2) recognize that “selling is part of the job,” 3) meet selling standards of the department, and 4) know the “general location of merchandise in store [sic].” The Employer did not provide specific examples of how nutrition employees might be evaluated under any of those criteria, and stated unequivocally that those evaluations have no affect on employees’ wages or merit bonuses. Rather, the evaluations are merely a guidance tool.

### **C. The Sumner Nutrition Department**

The Sumner nutrition department (herein, “nutrition”) is an approximately 2,000 to 3,000 square foot area within the Food section and is identified to customers as the “Natural Choices” section. There, the Employer stocks organic foods and other grocery items, dietary supplements, and certain non-food items. The nutrition department is located next to the produce and grocery and frozen food departments and the wine department. Nutrition is also close to the service bakery and the store’s café.<sup>14</sup>

The Sumner nutrition department has five employees, including the nutrition manager. Because nutrition is under the Food manager’s control, the nutrition manager reports directly to the Food manager. The Food manager or one of his direct reports has ultimate control over nutrition employees’ schedules and whether nutrition employees work overtime.

Sumner nutrition employees are scheduled to start work as early as 7 a.m., when the store opens to customers, and are scheduled to work as late as 10 p.m. to assist in closing.

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<sup>14</sup> The Employer asserts on brief that the Sumner nutrition department is “surrounded by” departments that are not covered by the grocery contract. The record, however, is clear that the produce, “wine cellar,” and grocery and frozen foods departments are proximate to the nutrition department and employees working there are covered by the grocery contract. Moreover, many of the departments that the Employer suggests are adjacent to nutrition (e.g., health and beauty, books and magazines, and the check stands) are actually separated from nutrition by the produce, grocery, and frozen food departments.

Typically, nutrition employees are scheduled to meet the freight demands of the department, but also to ensure that at least one nutrition employee is in the department from 5 p.m. to 7 p.m. to provide customer service during the busiest shopping time of the day. Shifts for nutrition employees range from 4 to 9 hours long. No nutrition employees work more than 40 hours per week.

Sumner nutrition employees are responsible for general maintenance of the nutrition department, merchandising nutrition product, maintaining the product on hand, removing out-of-date products from the shelves, and overall customer service for the nutrition department. The minimum requirements for working in nutrition are a high school diploma and the ability to read and write English. Prior to starting their employment, nutrition employees do not receive any special training and they attend the same orientation given to all of the Employer's employees.

Once hired, nutrition employees gain knowledge about the department and products therein through the Employer's "buddy system" for on-the-job training.<sup>15</sup> Through the "buddy system," nutrition employees become familiar with the department, standards for processing freight, and customer service. Nutrition employees gain some "general knowledge on all of the products" in nutrition through the buddy system, but are expected to increase their knowledge of the products in their areas through "assimilation." Sumner nutrition manager Carole Eckert defined "assimilation" as "being near the product quite often, hearing customers talk about products." In that regard, Eckert noted that customers often know more about products in the nutrition department than the nutrition employees and, therefore, she expects nutrition employees to learn about products in the department through conversations with customers. Approximately once a month, nutrition employees may watch FMTV - Fred Meyer Television – broadcasts regarding a specific product (described by one witness as a "kind of infomercial" for the featured product). Nutrition employees may also take part in Internet or web-based training, but Eckert described such training as "very vague."

The process for "working" freight in nutrition is similar to the processes in other departments storewide. Nutrition freight is delivered almost daily with dry goods and dairy items delivered on the alternating days.<sup>16</sup> A receiving clerk moves the palletized, shrink-wrapped freight to the nutrition section of the stockroom where it will remain until nutrition employees remove the plastic wrap, transfer it to pushcarts or so-called "u-boats," and move it to the nutrition department where they will put the products on shelves, displays, or in refrigerated coolers. Because a number of nutrition items are cross-merchandised (stocked both in nutrition and other food departments), nutrition employees may take those items to other locations in the grocery department. When crossover items located in other areas of the grocery department need to be restocked, the grocery person in charge (PIC) or Food manager will notify a nutrition employee who will restock the items. Moreover, nutrition employees are required to check those areas on a daily basis.

Nutrition employees' freight-related duties put them in regular, albeit brief, contact with grocery employees, usually when retrieving freight from storage areas or stocking cross-

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<sup>15</sup> The Employer uses the "buddy system" in departments store-wide to assist new hires in learning about the various aspects of their jobs.

<sup>16</sup> The Employer estimates that nutrition receives approximately 1 to 1½ pallets of dry goods; perishable and dairy deliveries to nutrition are much smaller.

merchandised items. Nutrition employees have virtually no work-related contact with Apparel or Home department employees.

Working freight is considered an important function for nutrition employees. Eckert stated that she will “chastise” nutrition employees if they fail to complete freight-related tasks in the timeframe allocated. Nutrition employee Justin Dines—who regularly works day and evening shifts during the week—testified that, depending on the amount of freight delivered, he might spend up to 90% of his working time performing freight-related work.

The Employer has described nutrition as a selling department and asserts that nutrition employees are “evaluated on their selling responsibilities.” Specifically, Ayers described nutrition as “a specialized area that has products that are unique to that area that require produce knowledge and we want people to be salespeople in that department.” Thus, for example, if a customer is looking for soy milk, nutrition employees could seize that opportunity to induce that customer “to buy all soy products [e.g., soy cereals or soy-based bars] that we could sell them that day.” For her part, Eckert could not recall ever telling nutrition employees that they are required to “sell,” she only hoped they would learn to do so by following her example.

Dines offered a different view of nutrition employees’ obligation to sell. Dines described the nutrition employees’ focus at work as the maintenance of the department, and customer service, not selling merchandise. Aware of the Employer’s definition of a selling department, Dines stated that nutrition employees are not expected to encourage customers to buy more expensive or additional items. Dines testified that nutrition employees scheduled from 5 p.m. to 7 p.m. are required to be in the nutrition department during those hours to provide assistance to customers, but described his responsibilities as more customer service (helping customers find specific products, providing very basic product information) than selling. Even including that time, however, Dines testified that on any given day, he spends as little as 10% and no more than 25% of his day providing direct customer service; the balance of his time is spent working freight and engaging in recovery.

When nutrition employees are on a break, they contact the nutrition manager, Food manager or Food Person-In-Charge (PIC) to cover nutrition and handle customer questions. Because the Food manager or PIC may have to attend to duties elsewhere, there are times when nutrition is not staffed.

When the department is understaffed, the nutrition manager will attempt to call in an unscheduled Sumner nutrition employee or a nutrition employee from another Pierce County store. The record evidence shows that only twice since the store opened in 2004 has a low-level grocery clerk worked in nutrition, and only then to perform recovery tasks. Nutrition employees have not been assigned to work in other departments, but have worked in the nutrition department of other stores.

The parties stipulated that nutrition employees are paid on the same wage scale, receive the same health and welfare benefits and pension benefits, and receive the same additional compensation and benefits as Sumner general merchandise employees. The parties further stipulated that Sumner grocery employees receive different wages and benefits, and have working conditions that are “significantly different” when compared to those of Sumner general merchandise employees.

### III. ANALYSIS

#### **A. The Union Has Not Waived Its Right to Represent Nutrition Department Employees**

The Employer advances three related arguments as to why the Board should dismiss the instant petition: 1) Petitioner waived its right to seek a self-determination election for nutrition employees when it agreed to the unit description contained in the applicable grocery agreement; 2) the grocery contract bars the petition in this case; and 3) Petitioner did not reserve the right to challenge the exclusion of nutrition employees from the grocery unit. The Employer concedes that the Board recently rejected similar arguments in UMass Memorial Medical Center,<sup>17</sup> but urges me to distinguish UMass Memorial on its facts. Specifically, the Employer argues that Petitioner is not merely attempting to include nutrition employees in the grocery unit; rather it is attempting “to remove them from their agreed-upon placement in the multi-store Pierce County general merchandise unit.”

The Employer’s arguments are without merit. The Board in UMass Memorial reiterated its long-standing rule that a union is precluded from representing a specific group of employees during the term of a collective-bargaining agreement “only where the contract itself contains an express promise on the part of the union to refrain from seeking representation of the employees in question or to refrain from accepting them into membership.”<sup>18</sup> Thus, a promise not to seek to represent a particular group of employees may not be implied by way of an explicit exclusion from a contractual unit or on the basis of an “alleged understanding” between the parties during their negotiations.<sup>19</sup> None of the contracts at issue contain any express Petitioner promise not to include unrepresented nutrition employees within the grocery unit. Likewise there is no provision in any contract that explicitly addresses the situation presented, i.e., how to resolve representation issues for employees not included in an existing multi-facility unit. Finally, contrary to the Employer’s assertion, Sumner nutrition employees are not yet part of the multi-facility general merchandise unit; therefore, the Union’s petition is not an improper attempt to remove those employees from that unit. In these circumstances, I find that UMass Memorial is controlling and there is no basis to dismiss the petition based on any waiver by the Petitioner.

The Employer’s assertion that the contractual additional stores clauses and the parties’ related bargaining history establish that Petitioner waived its right to challenge the exclusion of unrepresented nutrition employees from the grocery unit is likewise without merit. The Board recently rejected the notion that any party irrevocably waives its rights to access the Board’s processes merely by agreeing to contractual after-acquired or additional stores clauses. For example, in Shaw’s Supermarkets,<sup>20</sup> the Board majority cautioned that the Board “should be cautious about inferring a waiver of access to Board processes” from an additional stores clause where the “clause does not expressly foreclose the Employer (or the Union) from using Board

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<sup>17</sup> 349 NLRB No. 35 (February 20, 2007).

<sup>18</sup> Id., slip op. at 2, citing Briggs Indiana Corp., 63 NLRB 1270 (1945). See also, Lexington House, 328 NLRB 894, 896-897 (1999).

<sup>19</sup> UMass Memorial, above, quoting Cessna Aircraft Co., 123 NLRB 855, 856 (1959) (emphasis supplied).

<sup>20</sup> 343 NLRB 963, 963 (2004) (by agreeing to additional stores clause employer did not irrevocably waive its right to file RM petition).

processes to resolve the issue of majority status.” Here, none of the applicable contracts contains an express waiver—by either party—to access the Board’s processes to resolve a situation like the one presented in this case. Thus, I am unwilling to find an express waiver in the circumstances of this case.<sup>21</sup>

### **B. The Appropriateness of a Self-Determination Election for Nutrition Employees**

A union may petition to add unrepresented employees to an existing bargaining unit by petitioning for a self-determination election. In a self-determination election, if the majority of employees votes against representation, they remain unrepresented, but if the majority of employees votes for representation, they become part of the existing unit.<sup>22</sup>

A union may petition for a self-determination election to represent a “residual” group of employees omitted from established bargaining units, or petition to represent a group of employees that does not belong to any existing bargaining unit but does not constitute a residual unit. When an incumbent union petitions to represent employees in a residual unit, the incumbent union may only represent the employees in the residual unit by adding them to the existing unit, usually by means of a self-determination election.<sup>23</sup> When the petitioned-for voting group does not constitute a residual unit, a self-determination election will be directed if the petitioned-for employees share a community of interest with the unit employees, and the employees to be added to the existing unit “constitute an identifiable, distinct segment so as to constitute an appropriate voting group.”<sup>24</sup>

Neither party argues that Sumner nutrition employees constitute a “residual” unit and I do not find those employees to be a residual unit in the circumstances of this case. Accordingly, I then must turn to the parties’ contentions regarding whether the Sumner nutrition employees share a community of interest with the multi-facility grocery unit of employees in Pierce County, to warrant the self-determination election sought by Petitioner in this case.

The Employer asserts that nutrition employees do not share a community of interest with grocery unit employees and that to include nutrition employees in the multi-facility grocery unit would effectively create an inappropriate unit. The Board has held that in order for a unit to be appropriate for purposes of collective-bargaining within the meaning of the Act, the unit need not be the only appropriate unit or the most appropriate unit; it need only be *an* appropriate unit.<sup>25</sup> Thus, in determining whether a unit is appropriate, the Board first examines the petitioned-for unit. If the petitioned-for unit is *an* appropriate unit, the inquiry ends.<sup>26</sup> If it is not an appropriate

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<sup>21</sup> I note that the Employer, too, has availed itself of the Board’s processes to resolve issues regarding Pierce County nutrition employees. As noted above, in Case 19-UC-719 the Employer sought clarification of the scope of the parties’ grocery and general merchandise units.

<sup>22</sup> Warner-Lambert Co., 298 NLRB 993 (1990).

<sup>23</sup> St. John’s Hospital, 307 NLRB 767 (1992).

<sup>24</sup> Warner-Lambert, 298 NLRB at 995. See also University of Pittsburgh Medical Center, 313 NLRB 1341 (1994).

<sup>25</sup> Barron Heating and Air Conditioning, Inc., 343 NLRB No. 58, slip op. at 3 (2004), citing American Hosp. Ass’n v. NLRB, 499 U.S. 606, 610 (1991); Overnite Transportation Co., 322 NLRB 723 (1996).

<sup>26</sup> Barlett Collins, Co., 334 NLRB 484, 484 (2001).

unit, the Board then examines whether an alternative unit suggested by the parties or another unit not suggested by the parties is appropriate.<sup>27</sup> To determine whether a petitioned-for multi-facility unit is appropriate, the Board evaluates the following community of interest factors: functional integration; employee contact and interchange; employees' skills and functions; common management and supervision; terms and conditions of employment; and bargaining history.<sup>28</sup>

Based upon a careful review of the record evidence and analysis of relevant Board principles, I find, contrary to Petitioner, that the Sumner nutrition employees do not share a community of interest with Petitioner-represented grocery unit employees sufficient to warrant the petitioned-for self-determination election.

### 1. Functional Integration

The record clearly establishes that the nutrition department is functionally integrated with the rest of the Employer's Food section. The nutrition department is identified as a Food department, under the authority of the Food section manager. Nutrition department products are stocked within the Food section with no discernible barrier between it and the rest of the Employer's grocery operation. Moreover, nutrition department products are received and stored in the Food stockroom, handled by Petitioner-represented grocery clerks, and cross-merchandised in many areas throughout the Food section. The fact that some of the food items sold in nutrition bear a different logo or may be exclusive to nutrition does not diminish the record evidence regarding nutrition's identity as part of the food operation.

In its brief, the Employer claims that nutrition is not functionally integrated with the Employer's food operation because it is considered a "general merchandise department." But the Employer does not suggest how nutrition is functionally integrated with the Employer's general merchandise operation. Regardless, the Employer's assertions that nutrition "is not identified as a food department" and that nutrition is "surrounded by" non-food departments are belied by the record evidence. Thus, the functional integration factor supports finding that the nutrition employees share a community of interest with the grocery unit.

### 2. Contact and Interchange

Nutrition employees have some work-related contact with grocery unit employees, but there is virtually no evidence of interchange. On the other hand, Sumner nutrition department employees have virtually no work-related contact with general merchandise employees.

As noted above, nutrition employees have contact with grocery employees when working freight and cross-merchandising products. When closing, nutrition employees go to other Food section departments and use the equipment there to perform cleaning tasks. Although, the record establishes that nutrition employees' contact with grocery employees is usually brief, it supports finding a community of interest between the nutrition and grocery employees.

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<sup>27</sup> Overnite Transportation Co., 331 NLRB 664, 663 (2000).

<sup>28</sup> See, e.g., Bashas', Inc., 337 NLRB 710 (2002) and cases cited therein.

With regard to interchange, the record shows that the Employer resolves nutrition staffing issues at Sumner by either calling in unscheduled Sumner nutrition employees or using nutrition employees from other stores.<sup>29</sup> Only twice in 4 years have grocery clerks worked in nutrition, and only to assist with “working” freight; no general merchandise employees have worked in the nutrition department. I find that the record evidence of such limited interchange does not establish that nutrition employees share a community of interest with grocery unit employees.

### 3. Skills and Functions

Nutrition employees and grocery unit employees possess similar skills and perform similar functions. While it is true that the specific tasks in each department differ somewhat, all Food section employees, including nutrition employees, handle food, “work” freight, recover their departments and assist customers. Like grocery employees, nutrition employees do not require any specialized training as a condition of employment, and any knowledge they gain regarding products in their departments is obtained through on-the-job training. Moreover, because of the demands of “working” freight in their departments, grocery and nutrition employees are expected to perform only a limited selling function, as compared with non-Food employees, by merely making customers aware of and encouraging them to consider new or similar products.

Because the Employer places such an emphasis on sales in non-food departments, general merchandise employees must possess sales skills and perform sales functions which are significantly different from those required of grocery and nutrition employees. The record shows that general merchandise employees, like nutrition and grocery employees, “work” freight, engage in recovery, and provide customer service, and perform a selling function. However, the primary focus for general merchandise employees is to encourage customers to buy as many products as possible. Indeed, as the Employer illustrated, general merchandise employees are expected to go to great lengths—including coordinating with employees in other departments—to maximize a customer’s overall purchase. In stark contrast, nutrition employees and grocery unit employees may help customers find certain products or offer basic information or opinions regarding certain products, but they are not expected to actively sell. Thus, I find that in this regard, nutrition employees share a community of interest with grocery unit employees.

### 4. Common Management and Supervision

Nutrition employees, like grocery unit and other Food section employees, are under the authority of the Food section manager. The Food manager has ultimate authority over Food section employees’ schedules, is involved in the assignment of overtime to Food section employees, and resolves problems arising in nutrition and other Food section departments. The record also shows that the Food manager or the Food PIC fills in when nutrition employees are on break. Contrary to the Employer’s assertions that the Food manager’s impact on nutrition employees’ employment “is of little consequence,” I find that in this regard, nutrition employees share a community of interest with grocery unit employees.

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<sup>29</sup> In this regard, the Employer’s practice at Sumner appears consistent with its practice for stores covered by the Pierce County agreements.

## 5. Terms and Conditions of Employment

The Employer argues that nutrition employees are largely scheduled during the day to assist customers and perform a selling function which, the Employer asserts, suggests that nutrition department employees' terms and conditions of employment are more similar to general merchandise employees than grocery unit employees. The record, however, suggests that the nutrition employees' hours are not dissimilar from many other Food section employees, particularly those charged with engaging in recovery throughout the day. Regardless, as discussed above, nutrition employees are required to approach and offer assistance to customers, but they are not actually required to perform the same "selling" functions that, for example, a garden center or apparel salesperson might. Thus, the customer service function performed by nutrition employees is more akin to that performed by other grocery employees and would support finding a community of interest with grocery employees.

The parties stipulated that Sumner nutrition employees are paid according to the same pay scale and receive the same benefits as the Sumner general merchandise employees. The parties further stipulated that Sumner general merchandise employees' pay, benefits, and working conditions are significantly different from grocery unit employees' pay, benefits, and working conditions. As the Employer points out, however, those differences are the direct result of the parties' collective-bargaining agreement covering grocery unit employees throughout Pierce County. As such, evidence regarding this factor is inconclusive.

## 6. Bargaining History

The parties' bargaining history regarding its Pierce County stores, perhaps more than any other factor, weighs heavily against finding that Sumner nutrition employees share a community of interest with Pierce County grocery unit employees.<sup>30</sup> In determining the appropriateness of a bargaining unit, prior bargaining history is given substantial weight. As a general rule, the Board is reluctant to disturb a unit established by collective-bargaining if the unit is not repugnant to Board policy or so constituted as to hamper employees in fully exercising rights guaranteed by the Act. See, e.g., Canal Carting, 339 NLRB 969 (2003); Ready Mix USA, Inc., 340 NLRB 946 (2003). A party challenging a historical unit as no longer appropriate has a heavy evidentiary burden. See Trident Seafoods, 318 NLRB 738 (1995); Canal Carting; Ready Mix. For nearly 30 years, the parties in Pierce County have bargained successive collective-bargaining agreements, each containing an additional stores clause. Pursuant to those agreements and specifically the additional stores clauses, Petitioner has consistently organized employees in accordance with the units defined therein. Where Petitioner has organized nutrition employees, the parties have excluded nutrition employees from the grocery unit, and included nutrition employees in the general merchandise unit. Given this clear bargaining history, proceeding to an election in the petitioned-for unit could result in an anomaly in Pierce County as Sumner nutrition employees would be the only nutrition employees to be included in the multi-facility grocery unit while nutrition employees at all other Pierce County stores are included in the multi-facility general merchandise unit. In these circumstances, I find that the parties' bargaining history strongly militates against a finding that Sumner nutrition employees share a community of interest with grocery unit employees.<sup>31</sup>

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<sup>30</sup> In its brief, Petitioner did not address the parties' bargaining history as a community of interest factor, nor did it cite case authority for its contention that Sumner nutrition employees share a community of interest with grocery unit employees.

<sup>31</sup> See, e.g., Whippany Paperboard Co., Inc., 119 NLRB 1615, 1616 (1958).

#### **IV. CONCLUSION**

I find, in light of the above and the record as a whole, that Sumner nutrition employees do not share a sufficient community of interest with employees in the multi-facility grocery unit. Although evidence regarding functional integration, work-related contact, common management and supervision, and similarity of skills and functions among Sumner nutrition and grocery employees support finding that those groups of employees share a community of interest, I find that evidence is outweighed by evidence regarding the lack of interchange among Sumner nutrition employees and grocery unit employees and the parties' extensive bargaining history.<sup>32</sup> I therefore find that the petitioned-for self-determination election would be inappropriate. However, Petitioner stated its willingness to proceed to a self-determination election among all Sumner store general merchandise employees, including nutrition department employees, in the event I found the petitioned-for group lacked a community of interest with the multi-facility unit of grocery employees; the Employer does not oppose such an election. Thus, I shall direct a self-determination election among the Sumner general merchandise employees, including nutrition employees, to determine whether this voting group wishes to be represented by Petitioner in the historical collective-bargaining unit of all general merchandise employees working for the Employer in its other one-stop stores located in Pierce County.

Accordingly, I will direct an election in the following appropriate voting group:

All regular full-time and part-time employees working in the general merchandise departments at the Employer's Sumner, Washington, store, INCLUDING employees working in the nutrition, apparel, home, photo electronics and music (PEM), shoes, garden center, and jewelry departments; but EXCLUDING pharmacy department employees, managerial employees, confidential employees, guards and supervisors as defined in the Act.

There are approximately ninety-three (93) employees in the voting group found appropriate.<sup>33</sup>

#### **V. DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the voting group found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the voting group who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been

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<sup>32</sup> Thus, the critical evidence in this case is significantly different from Case 19-RC-15036 where the record established that Petitioner-represented Food section employees regularly worked in the nutrition departments at the Lacey and Tumwater (Thurston County) stores, and there was no collective-bargaining history regarding a multi-facility general merchandise unit that included nutrition employees.

<sup>33</sup> Because the voting group found appropriate is larger than the petitioned-for unit, I shall, provide Petitioner with 14 days from the date of this decision to submit to this Region, an additional showing of interest among employees in that group. That showing of interest may not be submitted by facsimile transmission. Sec. 102.114, Rules and Regulations.

permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 367, affiliated with UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION. If a majority of the valid ballots in the election are cast for the Petitioner, the employees will be taken to have indicated their desire to be included in the existing recognized multi-facility General Merchandise Unit currently represented by the Petitioner, and it may bargain for those employees as part of that Unit. If a majority of the valid ballots are cast against representation, the employees will be deemed to have indicated their desire to remain unrepresented.

#### **A. List of Voters**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear, 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). The list may be initially used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election, only after I determine that an adequate showing of interest among the employees in the voting group found appropriate has been established.

In order to be timely filed, such list must be received in the Regional Office, 915 Second Avenue, 29<sup>th</sup> Floor, Seattle, Washington 98174, on or before **February 14, 2008**. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (206) 220-6305. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

#### **B. Notice Posting Obligations**

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club

Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

### **C. Right to Request Review**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **February 21, 2008**. The request may be filed through E-Gov on the Board's web site, [www.nlrb.gov](http://www.nlrb.gov), but may not be filed by facsimile.<sup>34</sup>

**DATED** at Seattle, Washington, this 7<sup>th</sup> day of February, 2008.

/s/ [Richard L. Ahearn  
Richard L. Ahearn, Regional Director  
National Labor Relations Board, Region 19  
2948 Jackson Federal Building  
915 Second Avenue  
Seattle, Washington 98174

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<sup>34</sup> To file a request for review electronically, go to [www.nlrb.gov](http://www.nlrb.gov) and select the E-Gov tab. Then click on the E-filing link on the menu. When the E-file page opens, go to the heading Board/Office of the Executive Secretary and click the "File Documents" button under that heading. A page then appears describing the E-filing terms. At the bottom of the page, check the box next to the statement indicating that the user has read and accepts the E-File terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the "Submit Form" button. Guidance for E-Filing is contained in the attachment supplied with the Regional office's original correspondence in this matter and is also located under "E-Gov" on the Board's website, [www.nlrb.gov](http://www.nlrb.gov).